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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
AND LEONARD BIEBER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The prohibition against employment discrimination set forth in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e(b), applies to an employer "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The question presented is whether Title VII applies to an employer who has fifteen or more employees on its payroll for every working day of the requisite number of weeks.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Darlene Walters was an appellant in the proceeding below.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The opinion of the district court (95-259 Pet. App. 13a-19a) is reported at 864 F. Supp. 71.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. On October 10, 1995, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 15, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The provision defining "employer" for purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provides:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service * * *, or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation * * *, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. 2000e(b).

Other pertinent provisions of Title VII and of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, are *reprinted at* 95-259 Pet. App. 20a-26a.

STATEMENT

This case concerns the meaning of the definition of "employer" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* An employer is covered by the nondiscrimination provisions of Title VII only if the employer "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). At issue is the method for counting employees for purposes of that jurisdictional definition. The district court held that hourly-paid employees are counted as employees for a working day only if they are physically at work or on paid leave on that day. The court rejected the interpretation of petitioner Equal Employment Opportunity Commission (EEOC) that such employees should be counted for a working day if they are on the employer's payroll. The court applied its own interpretation and ruled that respondent Metropolitan Education Enterprises, Inc. (MEE) did not have fifteen or more employees physically at work or on paid leave for each working day of 20 weeks. The court therefore dismissed the case for lack of subject matter jurisdiction. The court of appeals affirmed.

1. Petitioner Darlene Walters,[1] was employed as a payment collector by respondent MEE, an encyclopedia and educational materials sales company. Walters was denied a promotion to credit manager in 1989 and filed a charge of gender discrimination

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[1] Darlene Walters filed a petition for a writ of certiorari on August 14, 1995. *Walters* v. *Metropolitan Educational Enterprises, Inc.*, No. 95-259.

with the EEOC. After Walters filed the charge, MEE fired her in April, 1990. Walters then filed a charge of retaliation against MEE. See 95-259 Pet. 3.

On April 7, 1993, the EEOC filed suit against respondents MEE and Leonard Bieber, MEE's president and sole shareholder, in the United States District Court for the Northern District of Illinois, alleging that MEE fired Walters in retaliation for Walters' filing a gender discrimination charge, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). 95-259 Pet. App. 2a.[2] Walters intervened as a plaintiff as a matter of right under 42 U.S.C. 2000e-5(f)(1), alleged retaliation, gender discrimination based on respondents' refusal to promote her, and pendent state claims of retaliatory discharge and breach of contract. See 95-259 Pet. 3-4.

Respondents moved to dismiss for lack of subject matter jurisdiction, claiming that MEE was not an "employer" within the coverage of Title VII, 42 U.S.C. 2000e(b).[3] Respondents contended that MEE

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[2] Section 704(a) of Title VII makes it unlawful "for an employer to discriminate against any of his employees * * * because he has made a charge * * * under this subchapter." 42 U.S.C. 2000e-3(a).

[3] Title VII provides, in relevant part, that

> the term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person * * *, except that during the first year after March 24, 1972, persons having

lacked the number of employees necessary to meet the statutory definition because MEE's employees who were paid hourly (as opposed to salaried) should be considered employees only on days that they are either physically present at work or on paid leave. Respondents relied on *Zimmerman* v. *North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), in which the court of appeals had adopted that interpretation for the substantially similar provision in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 630(b).[4] The *Zimmerman* court adopted that interpretation on the ground that, to conclude otherwise would render superfluous the words "for each working day" that are included in the definition of "employer." 704 F.2d at 353-354. Petitioners urged adoption instead of the EEOC's method of counting employees, contending that, for purposes of Title VII, all of the employees on an employer's payroll on a particular day should be counted as employees of that employer for that day.

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fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. 2000e(b). Title VII defines "person" to include "one or more individuals, * * * [or] corporations." 42 U.S.C. 2000e(a). Title VII defines "employee" to mean "an individual employed by an employer," with certain exceptions not relevant here. 42 U.S.C. 2000e(f). For purposes of Section 2000e(b), "[t]he 'current' year is the calendar year in which the alleged discrimination occurred, and the preceding year is the year prior to that year." B. Schlei & Grossman, *Employment Discrimination Law* 996 (2d ed. 1983).

[4] The ADEA provides, in relevant part, that "employer" means "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. 630(b).

After lengthy discovery on the jurisdictional question, which included review of respondents' payroll registers, time cards, work diaries, and other timekeeping records, as well as depositions of the company's president and bookkeeper, the parties entered stipulations and prepared detailed charts summarizing the daily work schedule of each employee during each calendar week of 1990. EEOC C.A. Br. App. A9-A15; R. 38.[5] MEE's payrolled employees consisted of one salaried employee, two regular part-time hourly employees, and between 11 and 15 full-time hourly employees. The two part-time employees did not work every day. EEOC C.A. Br. App. A12. The parties stipulated that in 1990 respondents had 15 or more employees on its payroll for each working day in 47 weeks, but that 15 or more employees were physically present at work or on paid leave on each working day in only nine of those weeks. 95-259 Pet. App. 15a; EEOC C.A. Br. App. A12-A14.

The district court granted respondents' motion to dismiss, based on *Zimmerman*. It counted hourly and part-time employees as "employees * * * only on days when they are either physically present at work or on paid leave," and rejected an interpretation that would count all employees on the company payroll

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[5] Based on petitioner's allegation that a retaliatory discharge occurred in April, 1990, the calendar years 1990 and the "preceding calendar year," 1989, are the relevant jurisdictional periods under Section 2000e(b). See note 3, *supra*. The parties stipulated that respondents did not have fifteen or more employees working or on paid leave on each working day of 20 or more weeks during 1989. See EEOC C.A. Br. App. A14-A15. The parties developed detailed evidence concerning the various employees and their work schedules for 1990 only.

on the particular working day, regardless of their individual work schedules or pay status. 95-259 Pet. App. 16a-18a. In light of the parties' stipulation "that there were fifteen employees either present at work or on paid leave each day of the working week for only nine weeks of 1990," the court concluded that MEE was not an employer covered by Title VII and therefore dismissed petitioner's suit for lack of subject matter jurisdiction. *Id.* at 18a-19a.

2. The Seventh Circuit affirmed, adhering to *Zimmerman*. The court acknowledged that there were statements in the Title VII legislative history supporting the EEOC's contrary interpretation of the statute, but found that history "too confused and chaotic to be of much use." 95-259 Pet. App. 5a n.3. The court also recognized that, in enacting the Family and Medical Leave Act of 1993 (FMLA),[6] Congress used substantially similar language to define "employer," and that the Senate Report on the FMLA endorsed the EEOC's payroll method. 95-259 Pet. App. 7a-9a.

The court of appeals noted that the First and Fifth Circuits, as well as a number of district courts, had adopted the EEOC's payroll method (95-259 Pet. App. 9a-10a & n.5), while the Eighth Circuit and several district courts had followed *Zimmerman*. *Id.* at 10a & n.6. The court also acknowledged that the EEOC's Policy Guidance explicitly rejects the *Zimmerman*

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[6] The FMLA provides, in relevant part, that "employer" means "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employes for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. 2611(4)(A)(i) (Supp. V 1993).

approach and endorses the payroll method; the court deemed that Policy Guidance not entitled to deference because it was promulgated after the *Zimmerman* decision. *Ibid.* Finally, the court rejected arguments based on the undesirability of inconsistent interpretations of substantially similar language in different statutes, on the greater potential for employer evasion of statutory coverage presented under the *Zimmerman* interpretation, and on the comparative simplicity of the EEOC's payroll method. *Id.* at 11a.

Judge Ripple filed a concurring opinion in which he noted that *Zimmerman* "is not free from doubt." 95-259 Pet. App. 11a-12a.

REASONS FOR GRANTING THE PETITION

The court of appeals construed the definition of "employer" in Title VII, 42 U.S.C. 2000e(b), in a manner that conflicts with the interpretation of two other courts of appeals. The court erred in holding that, for purposes of counting an employers' employees for a working day under Title VII, hourly-paid employees are to be counted only for days on which they are physically present at the workplace or are on paid leave. The other courts of appeals have rejected that interpretation and have adopted, instead, the interpretation of the EEOC, the agency charged with administering, interpreting and enforcing Title VII. The EEOC determines the number of employees that an employer has on a particular day by counting the employees on the employer's payroll for that day. That interpretation is supported by the text, structure, and history of Title VII, as well as by principles of administrative deference. It is more consistent with the broad remedial purposes of Title VII and

creates a more workable method to determine statutory coverage.

The existing conflict among the circuits creates uncertainty and a lack of uniformity in the coverage of Title VII. It also creates confusion with regard to the application of several other federal statutes that base their coverage on substantially similar definitions of "employer." Review by this Court is therefore warranted.

1. As the court of appeals acknowledged, the decision of the Seventh Circuit in this case stands in direct conflict with the rulings by the First and Fifth Circuits. See 95-259 Pet. App. 9a n.5. The Seventh Circuit interprets 42 U.S.C. 2000e(b) to provide that, for purposes of determining whether an employer has the requisite number of employees for Title VII coverage, hourly-paid workers are counted in the number of employees for each day only if they are *physically at work or are on paid leave on that day.* In contrast, the First and Fifth Circuits count all the employees that are *on an employer's payroll for the day.* This is the interpretation also given Section 2000e(b) by petitioner the EEOC, the agency charged with administering Title VII.[7]

The First Circuit adopted its interpretation in *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1983), cert. denied, 466 U.S. 904 (1984). The court rejected the view that only employees who actually report to work on a particular day should be counted

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[7] See EEOC Policy Guidance N-915-052, *Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA*, 3 EEOC Compl. Man. (BNA) N:3311-N:3316 (Apr. 20, 1990) (EEOC Policy Guidance) (*reprinted at* 95-259 Pet. App. 30a-40a).

as employees for that day. The court noted that the legislative history weighed heavily against a daily attendance interpretation and found "no basis in authority, canons of statutory interpretation, legislative history or public policy to support" such an interpretation. 717 F.2d at 635. Under its decision, an employer "has" an employee on each day the employee is on the payroll. *Id.* at 634-635.

The First Circuit recently reaffirmed its interpretation in *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67 (1995). In doing so, it noted that Title VII adopted a definition of "employer" from an earlier statute that counted an employee for each day "that an employment relationship exists regardless of whether the employee reported to work each day." *Id.* at 70. The Fifth Circuit has agreed with the First Circuit's interpretation. *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980), citing B. Schlei & P. Grossman, *Employment Discrimination Law* 837-838 (1976) (to determine employer status under Title VII, "one looks to each of the 'working days' within the calendar weeks reviewed to see whether there were 15 or more individuals who were on the payroll regardless of whether they were actually working full time or on any particular day"); *Pascutoi* v. *Washburn-McRavy Mortuary, Inc.*, 11 Fair Empl. Prac. Case (BNA) 1325 (D. Minn. 1975).

The Eighth Circuit, on the other hand, has aligned itself with the court below. In a case interpreting the substantially similar definition of "employer" in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, see note 4, *supra*, the Eighth Circuit followed the Seventh Circuit's ruling in *Zimmerman*. *McGraw* v. *Warren County*

Oil Co., 707 F.2d 990, 991 (8th Cir. 1983). The Eighth Circuit reaffirmed *McGraw* in *EEOC* v. *Garden & Assocs., Ltd.*, 956 F.2d 842, 843 (1992); see also *Hoekel* v. *Plumbing Planning Corp.*, 20 F.3d 839, 840 (8th Cir.), cert. denied, 115 S. Ct. 448 (1994).

District courts in other circuits have been divided on the issue. For cases following the Seventh Circuit interpretation, see *Richardson* v. *Bedford Place Hous. Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994); *Lord* v. *Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (adopting *Zimmerman* approach, without citation to contrary binding First Circuit authority in *Thurber*); *EEOC* v. *Argent Industries, Inc.*, 746 F. Supp. 705, 708-709 (S.D. Ohio 1989); *Schoenbaum* v. *Orange County Center for the Performing Arts*, 677 F. Supp. 1036, 1039 (C.D. Cal. 1987); see also *Wright* v. *Kosciusco Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (applying *Zimmerman* as binding precedent, but criticizing interpretation and "urg[ing] its reconsideration"); *Norman* v. *Levy*, 756 F. Supp. 1060, 1063-1064 (N.D. Ill. 1990) (applying *Zimmerman* as binding precedent). For cases following the First and Fifth Circuits, see *Edwards* v. *Esau Investments, Inc.*, Civ. A. No. 93-4130-DES, 1994 WL 606073 (D. Kan. Oct. 31, 1994); *Reith* v. *Swenson*, 63 Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993); *Cohen* v. *S.U.P.A. Inc.*, 814 F. Supp. 251, 254-256 (N.D.N.Y. 1993); *Vano* v. *Au*, Civ. A. No. 91-0038-H, 1992 WL 175498, at *2 (W.D. Va. July 16, 1992); *Gorman* v. *North Pittsburgh Oral Surgery Assocs. Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987); *Evans* v. *Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas.

(BNA) 1553, 1554 (M.D.N.C. 1984), aff'd, 769 F.2d 1012 (4th Cir. 1985); *Lynn* v. *JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983); *Hornick* v. *Borough of Duryea*, 507 F. Supp. 1091 (M.D. Penn. 1980); *Pedreyra* v. *Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979); *Pascutoi* v. *Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1326-1327 (D. Minn. 1975).

This Court's resolution of this conflict is needed to ensure uniformity of federal court jurisdiction over Title VII claims.

2. The EEOC's interpretation of Section 2000e(b) is supported by the text and structure of Title VII as well as principles of administrative deference. The court of appeals erred in rejecting that interpretation.

a. Section 2000e(b) defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). The court of appeals believed that the "most natural" reading of Section 2000e(b) "looks to the number of employees physically at work on each day of the week." 95-259 Pet. App. 6a. However, an interpretation at least "equally consistent with the statutory language, would be reached by focusing instead on the requirement that the 'employer *have* twenty [or fifteen] or more employees'. It is certainly not inconsistent with these definitional provisions to conclude that an employer 'has' an employee on a working day, even if that employee is not physically present on that day—especially if he or she was there the day before and

is expected to show up for work on the next day." *Wright*, 791 F. Supp. 1331-1332.[8]

Focusing on whether an employer "has" 15 employees supports the EEOC's view that Section 2000e(b) requires a determination "whether an employment relationship exists" on the relevant day, rather than an examination of the actual work schedule of each employee. EEOC Policy Guidance N:3313. The EEOC's interpretation is also consistent with the common understanding of the meaning of the word "has"—when an hourly-paid employee is said to "have" an employer, or an employer is said to "have" an employee, the understanding is that the two people are involved in an employment relationship. That relationship does not cease to exist when the hourly-paid employee has a day off without pay.[9]

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[8] The court in *Wright* concluded that "the far sounder interpretation of these statutes is that an employer 'has' an employee not only if he or she works on a particular day, but rather if he or she is on the company's payroll." 791 F. Supp. at 1331. While bound to follow *Zimmerman*, the court in *Wright* urged its reconsideration. *Id.* at 1332.

[9] The text of Section 2000e(b) suggests that emphasis is properly placed on whether an employer "has" 15 employees rather than on the "for each working day" phrase. The "for each working day" language is included only in the initial clause of Section 2000e(b), where it specifies that 15 employees are the threshold number required for coverage. The last clause of Section 2000e(b) does not use the phrase "for each working day." It provides that "during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers." Both of these clauses establish the number of employees that trigger coverage for a particular time period and both must be interpreted in the same manner. The absence of the phrase "for each working day" in the last clause of

The court of appeals erred in concluding that its interpretation of Section 2000e(b) was required by the statute's plain text in order to give meaning to the phrase "for each working day." 95-259 Pet. App. 6a. The EEOC's interpretation of Section 2000e(b) gives meaning to the phrase "for each working day" because an employee is counted "for each working day" only if the employee is on the payroll on that day.[10]

In addition, the court of appeals' interpretation strays far from the text and structure of Title VII.

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the provision indicates that Congress did not intend the use of that phrase in the initial clause to be interpreted to alter the common meaning of the number of employees that an employer "has." See also Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253-254 (originally enacted version of Title VII established 25 employees "for each working day" in 20 or more weeks as the minimum number to trigger coverage, but also included three clauses that did not use the phrase "for each working day," and provided that persons would not be considered employers if they had fewer than 100 employees in the first year after the effective date, fewer than 75 in the second year, or fewer than 50 in the third year).

[10] The Senate Report accompanying the FMLA, see note 6, *supra*, expressly approves the EEOC's interpretation of Title VII's definition of "employer" as the intended interpretation of the FMLA "employer" definition. See S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993). The Report states that "[t]he quoted language parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, '[e]mploys * * * employees for each working day' is intended to mean 'employ' in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose." *Id.* at 22.

The court of appeals would distinguish between hourly-paid employees who are not at work because it is their day off (without pay) and hourly-paid employees who are not at work because they are on paid leave. There is no basis in the text of Title VII for making such a distinction. Nor would it make sense to count an hourly employee who is on vacation (with pay) but not to count one on his or her regular day off without pay. In addition, the Seventh Circuit appears to include as employees all salaried employees, regardless of their daily attendance or schedule.[11] The EEOC's interpretation, in contrast, counts all employees—salaried and hourly, full-time and part-time, on paid or unpaid leave—who are on the payroll for the working day. That interpretation is much more consistent with the statutory language which appears to draw no distinction based on payment terms or leave status.

b. The history of the adoption of Section 2000e(b) supports the validity of the EEOC's interpretation. The *Thurber* court pointed to the fact that, during the consideration of Title VII by Congress, Senator Dirksen stated that the definition of "employer" was derived from the Unemployment Compensation Act, see 26 U.S.C. 3306(a) (Supp. II 1954). 110 Cong. Rec. 13,087 (1964). At that time, the Internal Revenue Service had a settled ruling interpreting that statute (formerly codified at 26 U.S.C. 1607(a)

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[11] The *Zimmerman* court purported to leave open the method of counting hourly paid employees on paid leave or on non-paid standby status. See 704 F.2d at 354 n.6. The court below, however, stated that its method of counting includes hourly-paid and part-time employees as employees "only on days when they are physically present at work or on paid leave." 95-259 Pet. App. 3a.

(1939)) to count employees in the coverage determination "for each day that an employment relationship exists regardless of whether the employee reported to work each day." See *Thurber*, 717 F.2d at 634, citing Rev. Rul. 55-19, 1955 C.B. 496. In the First Circuit's view, this fact "weighs heavily against" the argument that "the insertion of the words 'for each working day' in the statute necessarily imports a Congressional intent to restrict application of the statute to employers who had 15 or more employees actually at work on each working day in each of 20 or more calendar weeks."[12] *Thurber*, 717 F.2d at 634; see also EEOC Policy Guidance N:3313-N:3314 (relying on *Thurber* court's view of Title VII legislative history).

c. The court of appeals has failed to afford proper deference to the reasonable interpretation of the EEOC, the agency charged with administering, interpreting and enforcing Title VII. The sole justification given by the court of appeals for refusing to defer to the EEOC interpretation is that the EEOC's

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[12] The court of appeals below acknowledged that "certain remarks of Senator Dirksen are consistent" with petitioner's position, but concluded that "the legislative history of Title VII is too confused and chaotic to be of much use." 95-259 Pet. App. 5a n.3. Neither the court of appeals, nor any other court, however, has located in the legislative history of the nondiscrimination laws any indication of congressional intent to exempt from coverage an employer who has an employment relationship with the required number of employees for the requisite number of days and weeks as evidenced by payroll records, simply because on any particular working day fewer than 15 employees actually report to work. See *Thurber*, 717 F.2d at 635 ("there is nothing in the record to indicate a Congressional intent to require that employees report to work on each day that they are included" in the coverage determination).

Policy Guidance setting forth its interpretation was promulgated after the court's ruling in *Zimmerman*. 95-259 Pet. App. 10a. The court stated that "[w]hile we afford deference to legitimate agency interpretations of statutory language made before we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction." *Ibid.*, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). In reaching this conclusion, the court of appeals misapplied principles of administrative deference and also erred in stating that the EEOC's interpretation post-dated the court's ruling on the issue.

i. The EEOC is charged with administration, interpretation and enforcement of Title VII. See *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988) (recognizing that Title VII language "may bear [a] meaning more naturally or more frequently in common usage," but upholding alternative interpretation adopted by EEOC because "it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."); see also *id.* at 126 (O'Connor, J., concurring) (while "agency could quite reasonably conclude that the statutory language warrants giving the word 'terminated' * * * its more natural reading * * * traditional deference accorded the EEOC in interpretation of this statute" required upholding alternative agency construction). The contrary interpretations of the statutory language in this case by the First Circuit,

Fifth Circuit and numerous district courts reflects the fact that, despite the purported "plain text" analysis of the Seventh Circuit, Section 2000e(b) is not unambiguous.

We argue above that the EEOC's interpretation of Section 2000e(b) is the correct interpretation of that provision. There certainly cannot be any question that at the very least, the EEOC has defined "employer" in a way that is reasonable in light of the text and Congress's evident intent in enacting Title VII. See *Thurber*, 717 F.2d at 634-635 (legislative history shows "Title VII was considered a generally remedial statute, and the prevailing majority in Congress intended to give it broad effect") (citing comments of Senators Morse, Saltonstall and others, 110 Cong. Rec. 13,087-13,093 (1964)); see also *Zimmerman*, 704 F.2d at 353 (ADEA "is remedial in nature and should be given liberal interpretation in order to effectuate the purpose of the Act. * * * Such liberal construction should extend to the definition of employer."). The EEOC's interpretation also yields a more administrable rule than does the construction of the court of appeals.

ii. The court of appeals made two errors regardnig the timing of the EEOC's interpretation in relation to its refusal to accord deference to the EEOC's interpretation. First, the Seventh Circuit did not rule in *Zimmerman* on the precise issue in this case because *Zimmerman* concerned the ADEA rather than Title VII. At the time of the April 20, 1990, issuance of the EEOC Policy Guidance on which the court of appeals relied for the EEOC interpretation, see 95-259 Pet. App. 10a, there had, in fact, not yet been a ruling by the Seventh Circuit interpreting the Title VII provision. In such circumstances, there is

no reasonable basis for failing to give deference to the agency's interpretation. To the extent the timing of the Policy Guidance could be a basis for rejecting the Policy Guidance's interpretation, that reasoning would apply only to its interpretation of the ADEA, not Title VII.

More significant is the fact that the court's analysis is premised on the belief that the EEOC's 1990 Policy Guidance was the first pronouncement of the agency's interpretation of the statutory language in question. In fact, pronouncement of the EEOC's interpretation of Section 2000e(b) *predates* the *Zimmerman* opinion and was virtually contemporaneous with the enactment of Title VII. In 1966, the EEOC published its *First Annual Digest of Legal Interpretations of Title VII of the Civil Rights Act of 1964.* That digest contained interpretations from the effective date of the Act, July 2, 1965, through July 1, 1966. One of those stated: "The term 'employees for each working day' as used in Sec. 701(b) [of the Act] refers to *persons on the payroll and regularly employed, not to the number of persons at work on any given day.* Thus, if an enterprise operates 7 days a week, but no employee works more than 5 days a week, the number of employees is the number who work regularly for any part of the 7-day week." *Digest* at 2, citing General Counsel Opinion dated May 11, 1966 (emphasis added). The Seventh Circuit was, moreover, aware of the EEOC's interpretation at the time it decided *Zimmerman. Zimmerman* acknowledged that several district court decisions lent support to the argument in favor of the payroll counting method. In doing so, the court recognized that "[i]n a case which seems factually on point, another court held that the crucial question is how

many employees were on the payroll during the week, not how many were at work on a given day." 704 F.2d at 353, citing *Pascutoi*, 11 Fair Empl. Prac. Cas. (BNA) at 1326-1327. In *Pascutoi*, the district court had explicitly deferred to the EEOC's interpretation, stating that the plaintiff relied on "two opinions by the EEOC General Counsel on October 18 and 20, 1966, that state that the crucial test is how many employees are on the payroll during the crucial 20-week periods and not how many are at work on a given day." *Id.* at 1326. The court then applied the EEOC's interpretation, based on its recognition that, as a remedial statute, Title VII should be given a broad interpretation and that "administrative interpretations of the Act by those assigned by Congress to enforce it are entitled to great deference." *Id.* at 1327, citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

3. The conflict in the circuits regarding the jurisdictional requirement for Title VII coverage of an employer calls for this Court's review. The conflict perpetuates uncertainty about whether employers are covered by Title VII and whether employees and employment applicants are entitled to the protection of that statute. The uncertainty also extends to other statutory schemes that contain substantially similar definitions of "employer." In addition to the ADEA and the FMLA noted above, see notes 4 and 6, *supra*, coverage of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* (Supp. V 1993), also depends on a substantially similar definition.[13] While these other statutes are not before

[13] The ADA provides, in relevant part, that "employer" means "a person engaged in an industry affecting commerce

the Court in this case, and may perhaps require different analyses to take into account different statutory structures and history, resolution of the issue in this case will usefully inform the interpretation of those provisions. In addition, the divergence in judicial opinion on the question of statutory coverage adversely affects the EEOC's charge-processing operations.

The question presented is of wide-ranging impact. The court of appeals remarked on "the large number of recent cases on both sides of the issue," 95-259 Pet. App. 10a. The method to be used to count employees affects the coverage determination for a very large number of small employers with part-time or non-salaried employees on flexible work schedules. Data compiled by the Bureau of Labor Statistics indicate that, during the last year, there were between 22 and 24 million part-time employees in the United States. See Bureau of Labor Statistics, U.S. Dep't of Labor, 42 *Employment and Earnings*, No. 1, at 21 (Jan. 1995). In addition, flexible work schedules are growing in popularity among full-time employees. The Labor Department reported in 1992 that "[t]he number of full-time wage and salary workers with flexible work schedules was 12.1 million in May 1991, up from 9.1 million in 1985," increasing the proportion of full-time workers with flexible schedules to 15.1 percent in 1991. See Bureau of Labor Statistics, U.S. Dep't of Labor, News Release No. 92-491, at 1 (Aug. 14, 1992).

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who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 12111(5)(A) (Supp. V 1993). The ADA also includes a transition period during which the threshold number of employees is 25. *Ibid.*

The Census Bureau periodically compiles data classifying business enterprises according to number of employees. In 1987, the most recent year for which comprehensive data have been issued, there were 452,986 companies with 10-19 employees; those companies collectively employed 6,046,985 employees. Bureau of the Census, U.S. Dep't of Commerce, *1987 Enterprise Statistics: Company Summary* 17 (Table 3) (June 1991). The Census Bureau further reports that, by 1991, the number of enterprises with 10-19 employees was 554,378, employing a total of 7,428,251 employees. See *1991 Enterprise Statistics* (Table 1).

The data thus suggest that there are tens of thousands of employers who are within the range of the jurisdictional minimum, and that a significant number of employees of such employers are likely to work part-time or on flexible work schedules. The court of appeals' approach to the coverage issue would require a cumbersome and time-consuming examination of attendance and leave schedules for each working day at each employer whose coverage is uncertain. That approach unnecessarily complicates the coverage determination.[14] In this case, for example, the district court limited discovery to the jurisdictional coverage question, and the parties spent eight months review-

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[14] See EEOC Policy Guidance N:3316 (Proof under *Zimmerman* approach "would be difficult for plaintiffs to obtain. Even assuming that an employer kept and maintained time cards and leave records, it would be an extremely tedious task to determine how many employees reported to work each day during the two-year period provided for by the statute. Although an employer's payroll records may indicate the number of hours an employee worked in a given week, they may not reveal on which days an employee reported to work.").

ing respondents' payroll registers, time cards, work diaries, and other timekeeping records, and deposed the company's president and bookkeeper, only to conclude that, under *Zimmerman*, respondents were not covered under Title VII. In contrast, the relative simplicity of the EEOC's payroll method conserves administrative resources and clarifies for the EEOC and a significant number of small employers, employees, and employment applicants whether the federal nondiscrimination laws extend to them.[15]

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[15] The court of appeals' approach also presents the possibility that an employer might manipulate the work schedules of its employees in order to avoid statutory coverage. See EEOC Policy Guidance N:3315; *Wright*, 791 F. Supp. at 1332-1333; *Gorman*, 664 F. Supp. at 214.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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